

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MELISSA ANN WRIGHT, Court Appointed
Guardian of BROGAN ZANE WRIGHT,
KAREN REIGER, and MIKE REIGER,

2:11-CV-01575-LRH-GWF

Plaintiffs,

v.

ORDER

WATKINS AND SHEPARD TRUCKING,
INC., a Montana Corporation; GREGORY
ANDREW BRITT, an individual, Does 1
through 5, and Roes 1 through 5,

Defendants.

Before the court is defendants Watkins and Shepard Trucking, Inc. (“Watkins”) and Gregory Britt’s (“Britt”) (collectively “Defendants”) Motions in Limine. Doc. #118, 119, and 120.¹ Plaintiffs Melissa Ann Wright, Court Appointed Guardian of Brogan Zane Wright (“Wright”), Karen Reiger, and Mike Reiger (collectively “Plaintiffs”) filed responses (Doc. # 132, 133, and 134).

I. Factual Background

This is a motor vehicle negligence case scheduled for bench trial in June 2016. On August 14, 2015, Defendants filed the present motions in limine to preclude certain evidence at

¹ Refers to the Court’s docket number.

1 trial. Doc. 118, 119, and 120. On September 14, 2015, Plaintiffs responded. Doc. # 132, 133,
2 and 134.

3 **II. Legal Standard**

4 A motion in limine is used to preclude prejudicial or objectionable evidence before it is
5 presented to the jury. Stephanie Hoit Lee & David N. Finley, *Federal Motions in Limine* § 1:1
6 (2012). The decision on a motion in limine is consigned to the district court's discretion -
7 including the decision of whether to rule before trial at all. *See Hawthorne Partners v. AT&T*
8 *Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (noting that a court may wait to resolve the
9 evidentiary issues at trial, where the evidence can be viewed in its "proper context"). Motions in
10 limine should not be used to resolve factual disputes or to weigh evidence, and evidence should
11 not be excluded prior to trial unless "the evidence [is] inadmissible on all potential grounds."
12 *See, e.g., Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). Even then,
13 rulings on these motions are not binding on the court, and the court may change such rulings in
14 response to developments at trial. *See Luce v. United States*, 469 U.S. 38, 41 (1984).

15 Generally, all relevant evidence is admissible. Fed. R. Evid. 402. Evidence is relevant if
16 it has "any tendency to make the existence of any fact that is of consequence to the determination
17 of the action more probable or less probable than it would be without the evidence." Fed. R.
18 Evid. 401. The determination of whether evidence is relevant to an action or issue is expansive
19 and inclusive. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384-87 (2008).
20 However, the court may exclude otherwise relevant evidence "if its probative value is
21 substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Further,
22 evidence may be excluded when there is a significant danger that the jury might base its decision
23 on emotion, or when non-party events would distract reasonable jurors from the real issues in a
24 case. *See Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001); *United*
25 *States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985).

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III. Discussion

In their first set of motions in limine, Defendants argue that (1) Dr. Schifini is unqualified to render opinions regarding the diagnosis and future prognosis of Mr. Wright's cognitive functioning, future work life capacity and loss of earnings, and long term care needs; (2) Dr. Schifini and Dr. Siegler's opinions regarding Mr. Wright's cognitive functioning, future work-life capacity and loss of earnings, and long term care needs are not based on a reliable and accepted methodology; (3) the Court should exclude the "addendum" of Dr. Siegler as untimely and the basis for the opinions offered therein is information Dr. Siegler possessed three months prior to the close of discovery; (4) Plaintiffs' treating physicians may not testify because they were not disclosed as witnesses in accordance with FRCP 26; and (5) the Court should exclude testimony of Enrique Vega and Terrance Clauretie regarding Mr. Wright's loss of earnings and work-life capacity because they failed to base their calculations on a reliable methodology.

In their second set of motions in limine, Defendants argue that (1) the Court should preclude the opinions of Brian Jones that go beyond rebuttal opinions and for which Mr. Jones is unqualified to offer; (2) the animation created by Mr. Jones as it is inaccurate, misleading, unfounded, and untimely disclosed; (3) the Court should preclude Plaintiffs from arguing or soliciting testimony that Mr. Britt was subject to a higher standard of care as a commercial truck driver; (4) the Court should exclude the testimony of Terrance Clauretie pursuant to FRE 403 as duplicative, unnecessary, and a waste of time; (5) the Court must exclude any evidence of or reference to Mr. Britt's traffic citation, plea of no contest plea, and judgment of conviction following the accident; (6) the Court should preclude references to citations and accidents unassociated with the subject accident as irrelevant and unfairly prejudicial; (7) the Court should exclude Plaintiffs' computation of damages because it is not supported by admissible evidence and fails to comply with the requirements of FRCP 26; (8) the Court should prevent any references to, arguments relying upon, or evidence or testimony of witnesses that were not timely disclosed, produced, or supplemented pursuant to FRCP 26; and (9) the Court should exclude

1 any videotaped or photographic evidence of Mr. Wright while he was in the hospital as such
2 evidence is unfairly prejudicial and not relevant to Mr. Wright's actual damages.

3 In their third set of motions in limine, Defendants argue that (1) the Court should
4 preclude Plaintiffs from presenting any evidence of the post-accident DOT investigation as
5 irrelevant and unfairly prejudicial; (2) the Court should preclude Plaintiffs from presenting any
6 evidence of Karen Reiger's medical expenses as Plaintiffs failed to designate any witness
7 capable of testifying that she reasonably and necessarily incurred medical expenses as a result of
8 this accident; (3) the Court should preclude Plaintiffs from making any arguments in support of
9 their claims for negligent infliction of emotional distress, as there is no evidence to support the
10 elements of said claims; (4) the Court should preclude Plaintiffs from making any reference to
11 the claims of punitive damages and negligent employment, supervision, and training against
12 Watkins and Shepard as irrelevant and prejudicial; (5) the Court should preclude Plaintiffs from
13 offering evidence of Watkins and Shepard's financial condition as irrelevant and limit evidence
14 of Mr. Britt's financial condition consistent with the requirements of NRS 42.005; (6) the Court
15 should preclude Plaintiffs from arguing Mr. Britt could see Mr. Wright in sufficient time to stop
16 his vehicle or that he intentionally ran Mr. Wright down; (7) the Court should preclude Plaintiffs
17 from making any argument or reference to Mr. Britt's logbooks, time to drive, or the amount of
18 time Mr. Britt was awake prior to the accident as all such evidence is irrelevant; (8) the Court
19 should exclude any and all evidence of the conduct of Watkins and Shepard as irrelevant to any
20 issue in this case; (9) the Court should exclude as irrelevant any evidence or argument relating to
21 the employment file of Mr. Britt; (10) the Court should exclude, pursuant to FRE 608, the
22 presentation of any extrinsic evidence intended solely to bolster or attack the credibility of any
23 witness; (11) the Court, pursuant to FRE 402 and FRE 403, should exclude the presentation of
24 evidence that has no tendency to make any fact of consequence to the determination of the
25 negligence issues or Mr. Britt's state of mind more or less probable than without the exhibits;
26 (12) the Court should prevent any references to, arguments relying upon, or evidence or

1 testimony of witness that were not timely disclosed or produced pursuant to FRCP 26(a) and (e),
2 or disclosed in the Pretrial Order; (13) the Court should preclude Plaintiffs from arguing that the
3 distance the mirrors extended from the vehicle caused Mr. Wright's injuries; (14) the Court
4 should preclude Plaintiffs from referring to the leave Mr. Britt took following the accident and
5 any refresher course Mr. Britt underwent following his return to work; (15) the Court should
6 preclude Plaintiffs from referring to an "emergent situation" and/or "emergency situation"; (16)
7 the Court should exclude the use of expert reports as evidence at trial because such reports are
8 inadmissible hearsay; (17) the Court should prohibit Plaintiffs from arguing that Defendants'
9 expert Dale Fridley concluded that Mr. Britt could see Mr. Wright "well in advance" of the
10 accident; (18) the Court should prohibit Plaintiffs from calling Watkins and Shepard's trial
11 representative as a witness; (19) the Court should limit the testimony of Plaintiffs' experts to
12 those opinions stated in their expert reports; (20) the Court should exclude all references to,
13 arguments concerning, and evidence of stress, emotional distress, or mental anguish allegedly
14 suffered by Plaintiffs as a result of this litigation; (21) the Court should prevent counsel from
15 making "golden rule" arguments, improperly infusing arguments with personal opinions, or
16 asking the court to decide issues in the case based on larger social or moral issues; (22) the Court
17 should exclude evidence of any liability insurance; (23) the Court should forbid any comment or
18 argument regarding the presence or absence of any party from the courtroom; (24) the Court
19 should require that any demonstrative aids and/or exhibits that counsel will rely on during
20 opening statements be revealed to opposing counsel immediately before opening statements,
21 such that objections thereto may be lodged with the Court and ruled upon without interruption.

22 As a preliminary matter, the Court notes that trial in this case will be a bench trial.
23 Because of this, the Court will be in a better position to rule upon challenges to witnesses and
24 evidence during the course of trial when there will be more context and a fuller understanding of
25 the issues and evidence in the case. "Where the gatekeeper and the factfinder are one and the
26 same—that is, the judge—the need to make such decisions prior to hearing the testimony is

lessened.” *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). A primary purpose of a motion in limine is to permit the pre-trial resolution of evidentiary disputes without having to present potentially prejudicial evidence in front of a jury. *See Pinal Creek Group v. Newmont Mining Corp.*, No. CV–91–1764–PHX–DAE, 2006 WL 1766494, at * 1 (D.Ariz. June 26, 2006). In resolving evidentiary disputes before trial, motions in limine avoid the need to “unring the bell” once inadmissible evidence has been presented to the jury. *Id.* (internal quotation marks and citation omitted).

The rationale underlying pre-trial motions in limine does not apply in a bench trial, where it is presumed the judge will disregard inadmissible evidence and rely only upon competent evidence. *Id.* When ruling on motions in limine, a court is forced to determine the admissibility of evidence without the benefit of the context of trial. *See LaConner Assocs. Ltd. Liab. Co. v. Island Tug and Barge Co.*, No. C07–175RSL, 2008 WL 2077948, at *2 (W.D.Wash. May 15, 2008); *Rettiger v. IBP, Inc.*, No. 96–4015–SAC, 1999 WL 318153, at * 1 (D.Kan. Jan.6, 1999) (recognizing that a court is almost always better situated during the actual trial to assess the value and utility of evidence). Moreover, because “the judge rules on this evidentiary motion, in the case of a bench trial, a threshold ruling is generally superfluous.” *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009). The more prudent course in a bench trial, therefore, is to resolve evidentiary doubts in favor of admissibility. *See Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc.*, No. 01 Civ 3796(PKL), 2004 WL 1970144, at *5 (S.D.N.Y. Sept. 3, 2004). “There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.” *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

A. First Set of Motions in Limine

1. Dr. Schifini's Qualifications

Defendants argue that Dr. Schifini, one of Plaintiff's medical experts, is unqualified to render opinions regarding the diagnosis and future prognosis of Wright's cognitive functioning,

1 future work life capacity and loss of earnings, and long term care needs because he is not a
2 neurologist or neuropsychologist. Plaintiffs argue that Dr. Schifini is qualified to testify because
3 he is a licensed, practicing physician with experience as a primary evaluator of patients and
4 coordinated care amongst multiple disciplines.

5 To qualify as an expert witness, “a witness must be shown to be sufficiently qualified by
6 ‘knowledge, skill, experience, training, or education’ before he will be permitted to give expert
7 testimony.” *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995). Although a
8 medical doctor need not be a licensed specialist in the particular area to which he intends to
9 testify, he must be sufficiently familiar with the field so as to be able to offer meaningful and
10 reliable opinions. *Sprague v. Bowen*, 812 F.2d 1226, 1231-32 (9th Cir. 1987) (in which the
11 Court accepted psychiatric testimony from a family doctor).

12 The Court finds that Dr. Schifini is qualified to testify in the objected areas. Dr. Schifini
13 is a licensed physician who has been practicing for more than two decades. Dr. Schifini has
14 extensive experience reviewing medical records and testifying as to treatment, particularly in the
15 area of work evaluations. His practice includes evaluating treatment provided to individuals
16 suffering from brain injuries, back injuries, head injuries, and soft tissue injuries. Dr. Schifini
17 has demonstrated sufficient knowledge, skill, experience, training, and education to testify as an
18 expert here. Therefore, the motion in limine is denied.

19 2. Dr. Schifini and Dr. Siegler’s Methodology

20 Defendants argue that the Court should exclude any opinions and testimony from Dr.
21 Schifini and Dr. Siegler, another of Plaintiff’s medical experts, regarding the diagnosis,
22 assessment, and prognosis of Wright’s cognitive abilities because neither doctor performed any
23 neurological tests or reviewed the records necessary to assess these issues.

24 For scientific opinion, the court must assess the reasoning or methodology, using as
25 appropriate such criteria as testability, publication in peer reviewed literature, and general
26 acceptance, but the inquiry is a flexible one. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir.

2010), as amended (Apr. 27, 2010) (in which the Court ruled the doctor's testimony admissible despite the fact that the doctor never saw or spoke to the patient). Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion. *Id.* Similarly, the Sixth Circuit held that a district court abused its discretion by excluding a physician's testimony based on extensive, relevant experience even though he had not cited medical literature supporting his view. *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.*, 388 F.3d 976, 982 (6th Cir.2004). Likewise the Third Circuit pointed out that a doctor's experience might be good reason to admit his testimony. *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 406–07 (3d Cir.2003).

Here, the challenges to Dr. Siegler and Dr. Schifini's methodology go more toward weight than admissibility, especially since this is a bench trial. Both doctors are qualified, have experience testifying in this area, and personally examined Wright in keeping with their experience. Their methodology is acceptable to support their testimony, and the motion in limine is denied.

3. Dr. Siegler's Addendum

Defendants argue that Dr. Siegler's addendum should be excluded as untimely and not in compliance with Federal Rule of Civil Procedure ("FRCP") 26(e). Plaintiffs counter that the Defendants have not been prejudiced because they examined Dr. Siegler regarding the damages calculations that were the basis of the addendum.

While the addendum by Dr. Siegler was untimely, the Defendants were not prejudiced by it. The damage calculations were the subject of cross examination at Dr. Siegler's deposition 19 months before his death and the addendum itself was physically produced one month after his deposition. The prejudicial effect is the key factor, and here there was none. *Richardson v. Korson*, 905 F. Supp. 2d 193, 199 (D.D.C. 2012) (in which the Court noted that "[t]echnical compliance with the rule's limitations, nevertheless, has not always proved fatal, since courts have instead applied a more flexible approach, focusing on the prejudicial effect of the late

disclosure”). Moreover, this subject matter is related to similar prospective testimony from Dr. Miciano, who has been fully deposed by Defendants. The Court finds there is no prejudice to the defendants, the addendum is a qualified subject of testimony, and the motion in limine is denied.

4. Non-disclosure of Treating Physicians

Defendants argue that Plaintiffs should be precluded from offering the testimony of Plaintiffs’ treating physicians because Plaintiffs did not disclose the physicians within the requirements of FRCP 26(a). Plaintiffs argue that Defendants were able to identify the medical providers through the provided medical records.

Rule 26(a) provides that a plaintiff must disclose “the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.” FRCP 26(a)(1)(A)(i). When a party fails to identify a witness, the party is not allowed to use that witness at trial unless the failure was substantially justified or harmless. FRCP 37(c)(1).

Here, the physicians were not properly disclosed under FRCP 26(a); however, they were disclosed through the medical records which were timely provided. Their depositions were taken by the defense. Although the Court does not excuse a failure to properly disclose the doctors’ names, the Court does find that the physicians were identified early on in the litigation, and there has been no prejudice to the defense. Because the failure to identify the treating physicians was ultimately harmless, they will be allowed to testify.

5. Methodology of Enrique Vega and Terrance Clauretie

Defendants argue that the testimony of economic experts Enrique Vega and Terrance Clauretie is based on flawed methodology and should therefore be excluded. Plaintiffs respond that the witnesses are qualified and their methodology sound.

To qualify as an expert witness, “a witness must be shown to be sufficiently qualified by ‘knowledge, skill, experience, training, or education’ before he will be permitted to give expert

1 testimony.” *Whiting*, 891 F. Supp. at 24. For scientific opinion, the court must assess the
2 reasoning or methodology, using as appropriate such criteria as testability, publication in peer
3 reviewed literature, and general acceptance, but the inquiry is a flexible one. *Primiano*, 598 F.3d
4 at 564.

5 The Court finds that Vega and Clauretie are qualified to testify. Both men have
6 experience in vocational assessments and completed a thorough review of Wright’s medical
7 records. Further, the methodology they used has been backed by several peer reviewed articles.
8 Ultimately, Defendants objections go more to the weight of the testimony than its admissibility.
9 Thus, the Court denies Defendants’ motion in limine.

10 **B. Second Set of Motions in Limine**

11 **1. The Opinions of Brian Jones**

12 Defendants argue that because Brian Jones is a rebuttal witness, his testimony should be
13 limited to rebutting the testimony of Defendants’ accident reconstructionist, Dale Fridley.
14 Plaintiffs respond that Jones’ opinions are in direct contradiction to the defense expert’s report
15 and should not be excluded. The defense also challenges Jones’ qualifications as to the standard
16 of care applicable to commercial truck drivers.

17 To qualify as an expert witness, “a witness must be shown to be sufficiently qualified by
18 ‘knowledge, skill, experience, training, or education’ before he will be permitted to give expert
19 testimony.” *Whiting*, 891 F. Supp. at 24. Moreover, FRCP 26(a)(2)(D) limits rebuttal expert
20 opinions to those matters that are “intended solely to contradict or rebut evidence on the same
21 subject matter identified by another party.”

22 The Court finds that Jones is a qualified witness to testify. Jones is a licensed engineer
23 and has worked in the field of accident reconstruction for more than two decades. However, his
24 testimony will be limited to rebuttal of the defense witness Fridley. The Court also notes that the
25 cause of the accident is a broad issue and that the Court’s inclination is that Jones’ rebuttal
26 testimony should be admissible without being specifically narrowed to rebutting specific

1 components of Fridley's testimony. Thus, the Court denies the motion in limine but defers final
2 ruling until trial.

3 2. Jones' Animation

4 Defendants argue that Jones' animation fails to meet the standard necessary for admission
5 into evidence, demonstrative or otherwise. Plaintiffs argue that the animation is founded on the
6 testimony of Britt, and a proper basis has been presented for its creation.

7 The Court denies this motion in limine without prejudice and reserves the issue for trial.

8 3. Jones' Statements Regarding Standard of Care

9 Defendants argue Plaintiffs should be precluded from suggesting Britt was subject to a
10 higher standard of care as a commercial truck driver. Plaintiffs respond that they will not be
11 arguing standard of care, but Britt's knowledge of how much more difficult it would be to stop a
12 truck in the event of an emergency.

13 The court denies this motion in limine without prejudice and reserves the issue for trial.

14 4. Terrance Clauretie's Testimony

15 Defendants argue that the testimony of Terrance Clauretie should be excluded pursuant to
16 Federal Rule of Evidence ("FRE") 403 because it is duplicative, unnecessary, and a waste of
17 time. Plaintiffs disagree because Clauretie is a necessary component of the report and the
18 calculations contained therein.

19 The court denies this motion in limine.

20 5. Traffic Citation, Plea of No Contest, Judgment of Conviction

21 Defendants argue that the misdemeanor citation, no contest plea, and judgment of
22 conviction are inadmissible under Nevada law. Plaintiffs argue that they intend to use the
23 citation and judgment of conviction to impeach Britt and to attack the Defendants' arguments
24 regarding fault being determined by the police officers on the night in question.

25 The misdemeanor citation, no contest plea, and judgment of conviction are not admissible
26 under Nevada law. *See* FRE 410(2) (a plea of nolo contendere is inadmissible in a civil action

1 against the defendant who made the plea); NRS 48.125 (“Evidence of a plea of nolo contendere
 2 or an of an offer to plea nolo contendere to the crime charged or any other crime is not
 3 admissible in a civil or criminal proceeding involving the person who made the plea or offer.”);
 4 *Langon v. Matamoros*, 121 Nev. 142, 111 P.3d 1077 (2005) (the Nevada Supreme Court held
 5 that evidence of a misdemeanor traffic violation is not admissible under NRS 41.133, which
 6 allows conviction of a crime to serve as conclusive evidence of facts necessary to impose civil
 7 liability). Thus, the Court grants the motion in limine to exclude any evidence of or reference to
 8 Britt’s traffic citation, plea of no contest, and judgment of conviction following the accident, but
 9 does note that this does not extend to the investigation of the accident by the investigating
 10 officers.

11 **6. Prior Citations**

12 Defendants argue that the Court should preclude references to citations and accidents
 13 unassociated with the subject accident as irrelevant and unfairly prejudicial. Plaintiffs state that
 14 they do not intend to introduce prior citations issued to Britt in their case in chief. Thus, the
 15 motion in limine is granted.

16 **7. Plaintiffs’ Damages Computation**

17 Defendants argue that the Court should exclude Plaintiffs’ computation of damages
 18 because it is not supported by admissible evidence and fails to comply with the requirements of
 19 FRCP 26. Plaintiffs argue that they did properly provide a computation of damages and that
 20 even then the Defendants have not been prejudiced in any way by the calculations provided.

21 The court denies this motion in limine without prejudice and reserves the issue for trial.

22 **8. Undisclosed Witnesses**

23 Defendants argue that the Court should prevent any references to, arguments relying
 24 upon, or evidence or testimony of witnesses that were not timely disclosed, produced, or
 25 supplemented pursuant to FRCP 26. Plaintiffs argue that they did timely disclose their witnesses
 26

1 and produce their documents and that even then the Defendants have not been prejudiced in any
2 way.

3 The Court denies this motion in limine without prejudice.

4 **9. Video and Photographic Evidence of Wright**

5 Defendants argue that the photographic and video evidence of Wright in the hospital
6 following the accident are irrelevant and unfairly prejudicial. Plaintiffs argue that the
7 photographic and video evidence is relevant to show Wright's condition during his recovery.

8 The Court finds that the photographic and video evidence of Wright in the hospital may
9 be relevant to Wright's injuries and pain and suffering. As to potential prejudice, "excluding
10 evidence in a bench trial under 'Rule 403's weighing of probative value against prejudice [is]
11 improper.'" *United States v. Kienlen*, 349 F.App'x 349, 351 (10th Cir.2009) (unpublished)
12 (quoting *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir.1981)). Under the
13 Federal Rules of Evidence, "admissibility of evidence is favored unless the probative value of
14 the evidence is so low as to warrant exclusion when prejudice is a factor." *Coffey v. United*
15 *States*, No. CIV 08-0588 JB/LFG, 2012 WL 1698289, at *3-4 (D.N.M. May 8, 2012). Rule 403
16 was designed "to keep evidence not germane to any issue outside the purview of the jury's
17 consideration." *Id.* For a bench trial, "we are confident that the district court can hear relevant
18 evidence, weigh its probative value and reject any improper inferences." *Id.* The motion in
19 limine is denied.

20 **C. Third Set of Motions in Limine**

21 **1. Post-accident DOT Investigation**

22 Defendants argue that the Court should preclude Plaintiffs from presenting any evidence
23 of the post-accident Department of Transportation investigation because it is irrelevant and
24 unfairly prejudicial. Plaintiffs oppose upon grounds of relevancy.

25 The Court denies this motion in limine without prejudice and reserves the issue for trial.

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1 **2. Karen Reiger's Medical Expenses**

2 Defendants argue that Plaintiffs should be precluded from presenting any evidence of
3 Karen Reiger's medical expenses because Plaintiffs failed to designate any witness capable of
4 testifying that she reasonably and necessarily incurred medical expenses as a result of the
5 accident. Plaintiffs argue that Karen Reiger's medical providers are competent to testify
6 regarding the necessity and reasonableness of the treatment.

7 The Court denies this motion in limine as moot because her case has been dismissed due
8 to her acceptance of an Offer of Judgment and the entrance of judgment in her favor by the clerk.
9 Doc. #153 and 154.

10 **3. Negligent Infliction of Emotional Distress**

11 Defendants argue that Plaintiffs should be precluded from making any arguments in
12 support of their claims for negligent infliction of emotional distress because there is no evidence
13 to support those claims. Plaintiffs argue that the claims should be able to proceed.

14 The Court denies this motion in limine without prejudice and reserves the issue for trial,
15 but notes that the Court's preliminary impression is that due to their personal involvement in the
16 accident Plaintiffs qualify as NIED claimants.

17 **4. Punitive Damages and Watkins and Shepard**

18 Defendants argue that because the Court granted summary judgment in favor of Watkins
19 and Shepard on the claim for negligent employment, supervision, and training, and the requested
20 punitive relief, the claims are irrelevant and Plaintiffs should not be allowed to reference them.
21 Plaintiffs argue that they do not intend to rely on this evidence, but if it becomes relevant based
22 upon testimony by the Defendants, then Plaintiffs should be allowed to respond in rebuttal. The
23 Court granted summary judgment on the punitive damages claims against Watkins and Shepard
24 and the motion in limine is granted.

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1 **5. Britt's and Watkins and Shepard's Financial Condition**

2 Defendants argue that because the Court granted summary judgment to Watkins and
3 Shepard on the punitive damages claims, their financial condition is irrelevant and must be
4 excluded by the Court. They further argue that pursuant to NRS 42.005, any determination
5 regarding the assessment of punitive damages must be done in a separate phase of trial from the
6 determination of the underlying liability, and thus any evidence on his financial condition should
7 be barred until it becomes relevant. Plaintiffs state that they do not intend to introduce evidence
8 on the financial position of Watkins and Shepard. The Court grants the motion in limine.

9 **6. Britt's Vision**

10 Defendants argue that Plaintiffs should be precluded from arguing that Britt could see
11 Wright in sufficient time to stop his vehicle because the argument is not supported by admissible
12 evidence. Plaintiffs argue that they should be allowed to argue that Britt failed to operate his
13 vehicle in a manner which shows a conscious disregard.

14 The Court denies this motion in limine without prejudice and reserves the issue for trial.

15 **7. Britt's Logbook**

16 Defendants argue that Plaintiffs should not be allowed to make any argument or reference
17 to Britt's logbooks, time to drive, or the amount of time Britt was awake prior to the accident
18 because that evidence is irrelevant. Plaintiffs argue that this is all relevant, especially as to the
19 issue of punitive damages.

20 The Court denies this motion in limine without prejudice and reserves the issue for trial,
21 but notes that the subject of the logbooks and any falsification of them may be relevant to the
22 issues of both negligence and punitive damages. It is also potentially admissible for cross
23 examination and impeachment of Britt.

24 **8. Conduct of Watkins and Shepard**

25 Defendants argue that because Watkins and Shepard were granted summary judgment on
26 the punitive damages and negligent hiring and training issues, their conduct is no longer relevant

1 to any issue of consequence in this action. Plaintiffs argue that their conduct is relevant in this
2 instance.

3 The Court is inclined to think that the conduct of Watkins and Shepard is not relevant
4 here, but will deny the motion in limine without prejudice and reserve the issue for trial.

5 **9. Britt's Employment File**

6 Defendants argue that Britt's work history pertaining to his fitness as a driver and his
7 post-accident application for unemployment shed no light on whether he acted negligently at the
8 time of the accident or his state of mind; therefore, the Court should exclude the employment file
9 as evidence at trial. Plaintiffs argue that the information in Britt's employment file is relevant to
10 establish Britt's failure to testify honestly.

11 This Court denies the motion in limine without prejudice and reserves ruling for trial.

12 **10. Impeachment Evidence**

13 Defendants argue that extrinsic evidence intended solely to bolster or attack the
14 credibility of any witness should be excluded pursuant to FRE 608. Plaintiffs argue that such
15 evidence is relevant.

16 The Court denies this motion in limine without prejudice and reserves the issue for trial.

17 **11. Britt's State of Mind**

18 Defendants argue that any evidence that has no tendency to make any fact of
19 consequence to the determination of the negligence or Mr. Britt's state of mind more or less
20 probable than without the exhibits should be excluded pursuant to FRE 402 and FRE 403.
21 Plaintiffs argue that Britt's state of mind is relevant given the punitive damages claim.

22 The Court denies this motion in limine without prejudice and reserves the issue for trial.

23 **12. Undisclosed Witnesses**

24 Defendants argue that the Court should prohibit any evidence or witnesses that were not
25 timely produced or disclosed pursuant to FRCP 26(a) and (e), or disclosed in the Pretrial Order.
26 Plaintiffs argue all treating physicians have been properly disclosed.

1 The Court denies this motion in limine without prejudice and reserves the issue for trial.

2 **13. Truck Mirrors**

3 Defendants argue that Plaintiffs should not be allowed to argue that the distance the
4 mirrors extended from the vehicle caused Wright's injuries because there is no evidence
5 suggesting that but for the alleged extra two inches on the mirrors, the accident would not have
6 occurred and Wright would have escaped injury. Plaintiffs argue that the location of the mirrors
7 is relevant to the accident analysis.

8 The Court denies this motion in limine without prejudice and reserves the issue for trial.

9 **14. Britt's Leave and Refresher Course**

10 Defendants argue that Britt's leave and refresher course were post-accident events that
11 could not have caused or contributed to the accident, they should not be admitted as evidence.
12 Plaintiffs argue that this is relevant information.

13 Defendants specifically argue that the refresher course was a subsequent remedial
14 measure and therefore inadmissible. FRE 407 states that "when measures are taken that would
15 have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is
16 not admissible to prove: negligence, culpable conduct"

17 The Court agrees that the refresher course was a subsequent remedial measure and grants
18 the motion in limine as to it; however, the Court denies the motion in limine as to Britt's leave
19 without prejudice, since the subject matter of Britt's leave following the accident could become a
20 cross examination or impeachment issue.

21 **15. "Emergent" and "Emergency"**

22 Defendants argue that characterizing the situation prior to the accident as an "emergent
23 situation" and/or "emergency situation" is unsupported by the evidence, misleading, and unfairly
24 prejudicial. Plaintiffs argue that these are accurate descriptors.

25 The Court denies this motion in limine without prejudice and reserves the issue for trial.

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1 **16. Expert Reports**

2 Defendants argue that the report of any expert is not admissible as evidence at trial
3 because they are hearsay. Plaintiffs argue that any expert report should be treated equally
4 between the parties.

5 The Court views physical expert reports themselves as hearsay. *Menalco v. Buchan*, No.
6 207-CV-01178-PMP-PAL, 2010 WL 428911, at *17 (D. Nev. Feb. 1, 2010). However, the
7 Court denies this motion in limine without prejudice and reserves the issue for trial.

8 **17. Fridley's Statements**

9 Defendants argue that Plaintiffs should not be allowed to use statements from Fridley's
10 preliminary analysis because it would be unfairly prejudicial. Plaintiffs argue that their
11 statements are not a mischaracterization and questions on Fridley's conclusions should be
12 allowed.

13 The Court denies this motion in limine without prejudice and reserves the issue for trial.

14 **18. Trial Representative as Witness**

15 Defendants argue that because their trial representative may have no personal knowledge
16 of the circumstances surrounding the accident or the injuries to Plaintiffs, Plaintiffs should be
17 prohibited from calling them as a witness. Plaintiffs argue that they cannot respond because they
18 do not know who will be present at trial.

19 The Court grants the motion in limine, unless the trial representative has also been listed
20 as a witness or becomes relevant as a rebuttal witness.

21 **19. Expert Opinions**

22 Defendants argue that pursuant to FRCP 26(a)(2)(B) and FRCP 26(e)(2), an expert
23 should not be allowed to testify and offer opinions beyond those stated in his expert report.
24 Plaintiffs state they have no objections to the testimony of experts being limited to that which has
25 been provided through the course of discovery.

26 The Court denies this motion in limine without prejudice and reserves the issue for trial.

20. Litigation Stress

Defendants argue that the Court should exclude all references to, arguments concerning, and evidence of stress, emotional distress, or mental anguish allegedly suffered by Plaintiffs as a result of the litigation because it is not a recoverable component of damages. Plaintiffs argue that they are entitled to show all the emotional suffering they have endured as a result of the accident.

“Federal court decisions are unanimous in holding that litigation-induced stress may not be recovered as damages.” *Picogna v. Bd. of Educ. of Twp. of Cherry Hill*, 143 N.J. 391, 397-99, 671 A.2d 1035, 1038-39 (1996). In a negligence action against a government employer, Judge Posner observed: “It would be strange if stress induced by litigation could be attributed in law to the tortfeasor. An alleged tortfeasor should have the right to defend himself in court without thereby multiplying his damages....” *Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir.1983); *see Timms v. Rosenblum*, 713 F.Supp. 948, 955 (E.D.Va.1989), *aff’d*, 900 F.2d 256 (4th Cir.1990) (denying recovery for litigation-induced stress in legal malpractice case because mental anguish attends all litigation); *Clark v. United States*, 660 F.Supp. 1164, 1200 (W.D.Wash.1987), *aff’d*, 856 F.2d 1433 (9th Cir.1988) (suggesting that although stress of litigation is caused by the underlying harm, pursuit of litigation is a matter of choice).

The Court grants the motion in limine.

21. Golden Rule Arguments

Defendants argue that Plaintiffs should be barred from making “golden rule” arguments, improperly infusing arguments with personal opinions, or asking the Court to decide issues in the case based on larger social or moral issues because of the danger of unfair prejudice to Defendants, confusion of the issues, and misleading the finder of fact under FRE 403. Plaintiffs argue that any limitation should apply to both sides.

This Court grants the motion in limine, and there shall be no “golden rule” arguments by either side.

Defendants argue that the Court should exclude any evidence of liability insurance pursuant to FRE 411. Plaintiffs do not object so long as this preclusion is applied equally to both sides.

23. Courtroom Presence

The Court grants the motion in limine.

Defendants argue that the Court should require that any demonstrative aids that will be used during opening statements be revealed to opposing counsel prior to opening statements. Plaintiffs do not object so long as this is applied equally to both sides.

The Court denies the motion in limine as moot because it is already this Court's practice and policy that any demonstrative aids or exhibits which counsel intends to refer to during opening statements or at any time during trial should be disclosed to opposing counsel beforehand (to the extent reasonably possible).

IT IS THEREFORE ORDERED that Defendants' motions in limine (Doc. #118, 119, and 120) are GRANTED in-part and DENIED in-part in accordance with this order.

IT IS SO ORDERED.

DATED this 19th day of January, 2016.

016. 
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE